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TERRY GODDARD
The Attorney General
Firm No. 14000

Michael M. Walker, No. 020315
Ann Hobart, No. 019129
Assistant Attorneys General
Civil Rights Division
1275 W. Washington St.
Phoenix, Arizona 85007
Telephone: (602) 542-8862
Facsimile: (602) 542-8899
civilrights@azag.gov
Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA ex rel. TERRY
GODDARD, the Attorney General, and THE
CIVIL RIGHTS DIVISION OF THE ARIZONA
DEPARTMENT OF LAW,

Plaintiff,

vs.

CITY OF COTTONWOOD; and CITY OF
COTTONWOOD POLICE DEPARTMENT,

Defendants.

No.

CV2009-014365

**COMPLAINT FOR DAMAGES
AND INJUNCTIVE RELIEF**

(Nonclassified Civil)

Plaintiff, the State of Arizona ex rel. Terry Goddard, the Attorney General, and the
Civil Rights Division of the Arizona Department of Law (collectively the "State"), for its
Complaint alleges as follows:

INTRODUCTION

This is an action brought under the Arizona Civil Rights Act to correct unlawful employment practices, to provide appropriate relief to an aggrieved person, and to vindicate the public interest. Specifically, the State brings this matter to redress the injury sustained because, at the time Charging Party Monica Kuhlert ("Kuhlert") was applying to be promoted to sergeant in December 2006, Defendants adopted a physical fitness testing policy and performance standards, General Order 206, which Defendants knew had a disparate impact on women. Before issuing General Order 206, Defendants had not validated the physical fitness test or performance standards as job related or necessary to the position of sergeant (or to any other law enforcement position with Defendants) and without considering less restrictive physical fitness testing standards that would satisfy Defendants' actual business needs without adversely affecting female police officers or applicants. Although General Order 206 did not require officers like Kuhlert who had been hired before January 1, 2007, to pass the physical fitness test until January 1, 2010, Defendants used Kuhlert's inability to pass the test as a pretext to deny her promotion to sergeant twice in 2007 and twice in 2008, and to promote four less-qualified men in her stead. More, Defendants relaxed testing protocols and passing standards for at least one man who applied to the CPD after January 1, 2007, to allow him to enter the police training academy, while holding Kuhlert and a state-certified female police officer who applied to the CPD after January 1, 2007, to more rigorous standards to prevent them from being promoted or hired. Therefore, Defendants actions in this case constitute disparate impact and disparate treatment employment discrimination based on sex in violation of the Arizona Civil Rights Act, A.R.S. § 41-1463(B)(1) & (2).

JURISDICTION AND VENUE

1. This Court has jurisdiction of this matter pursuant to A.R.S. § 41-1481(D).
2. Venue is proper in Maricopa County pursuant to A.R.S. § 12-401(17).

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PARTIES

3. The Civil Rights Division of the Arizona Department of Law is an administrative agency established by A.R.S. § 41-1401 to enforce the provisions of the Arizona Civil Rights Act, A.R.S. § 41-1401 *et seq.*

4. The State brings this action on its own behalf and on behalf of Monica Emma Kuhl, an aggrieved person, as provided by A.R.S. §§ 41-1481(D) and (G).

5. Defendant City of Cottonwood ("Cottonwood") is an incorporated municipality located in Yavapai County, Arizona. Cottonwood's City Hall is located at 827 N. Main Street, Cottonwood, Arizona 86326.

6. Defendant Cottonwood Police Department ("CPD") is a department of Cottonwood. CPD's headquarters is located at 199 S. 6th Street, Cottonwood, Arizona 86326.

7. Kuhl is currently a detective with CPD, where she has worked as a law enforcement officer since approximately November 23, 1997.

8. Doug Bartosh ("Bartosh") currently is Cottonwood's City Manager. When General Order 206 was adopted, Bartosh was CPD's Chief of Police.

9. Jody Fanning ("Fanning") currently is CPD's Chief of Police.

10. Gary Eisenga ("Eisenga") currently is a Patrol Sergeant for CPD and has primary responsibility for administering the physical fitness test under General Order 206.

11. At all relevant times, Cottonwood and CPD (when collectively, "Defendants") were employers within the meaning of A.R.S. § 41-1461(4)(a).

12. At all relevant times, Kuhl has been an employee of CPD within the meaning of A.R.S. § 41-1461(3)(a).

13. The State is informed and believes and therefore alleges that Defendants were legally responsible for the acts or omissions giving rise to this cause of action and legally and proximately responsible for damages as alleged pursuant to A.R.S. § 41-1481(G).

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BACKGROUND

14. CPD's General Order 206 became effective on or about December 12, 2006. Pursuant to General Order 206, all CPD sworn personnel hired on or after January 1, 2007, would undergo mandatory physical fitness testing twice each year and be required to meet or exceed minimum performance standards set forth in the Order. All sworn members employed by CPD prior to January 1, 2007, would undergo mandatory physical fitness testing twice each year, but would not be required to meet or exceed the minimum standards until the third year following issuance of the Order. As such, sworn personnel employed by CPD before January 1, 2007, would not be required to meet or exceed the Order's physical fitness standards until January 1, 2010.

15. The physical fitness performance standards contained in General Order 206 were developed in a study conducted by Fitness Intervention Technologies ("FIT") in 2000. FIT was commissioned by Arizona Department of Public Safety ("DPS") to conduct this study in order to identify and validate job-related physical fitness tests, standards and programs for applicants and recruits to the Arizona Law Enforcement Academy ("ALEA") and for incumbent officers of selected agencies. Some county and local police departments, including CPD, also participated in the study by providing written information about the physical performance demands for the job of "police officer" at their respective agencies.

16. The FIT study recommended implementing "absolute" physical fitness standards, as opposed to the "relative" fitness standards based on age and gender used by many police departments, to ensure that all officers could satisfy all of the performance demands of the composite "police officer" job description. Additionally, whereas many agencies only require new applicants to satisfy the relative physical fitness requirements, the FIT study also recommended making passing absolute physical fitness standards mandatory for incumbent officers as well.

1 17. The FIT study recommended that participating police agencies adopt a battery of
2 physical fitness tests, to be performed in sequence with brief rest periods between each test,
3 and require that both applicants and incumbent officers satisfy the minimum absolute standard
4 for each test. The FIT study physical fitness tests and performance standards are as follows:
5 (1) an agility run to be completed in 18.2 seconds or less; (2) a single repetition bench press of
6 175 pounds or 79% of the officer's body weight; (3) a vertical jump of not less than 16 inches;
7 (4) a 300 meter run in 60 seconds or less; (5) a maximum number of push-ups in succession
8 (but no fewer than 30); (6) not less than 34 sit-ups in one minute; and (7) a 1.5 mile run in not
9 less than 15 minutes and 4 seconds.

10 18. The FIT study demonstrated that making these absolute fitness standards
11 mandatory would have an adverse impact on female police officers. For example, testing of
12 the Phoenix Police Department conducted in the context of the FIT study yielded the following
13 relative fail rates for men and women: (1) agility run—27% for men; 94% for women; (2) 175
14 pound bench press—21% for men; 100% for women (2)(a) weight ratio bench press—7% for
15 men; 78% for women; (3) vertical jump—21% for men; 89% for women; (4) 300 meter run—
16 26% for men; 84% for women; (5) push-ups—24% for men; 84% for women; (6) sit-ups—
17 20% for men; 36% for women; and (7) 1.5 mile run—24% for men; 84% for women.

18 19. The FIT study stated that women could be expected to improve their performance
19 by 20 to 25% in 3 to 6 months with a moderate training program. The study also
20 acknowledged, however, that even with training, the average woman police officer may not be
21 able to satisfy the FIT standard for push-ups or the bench press.

22 20. By issuing General Order 206, Defendants adopted and made mandatory for all
23 applicants to the CPD force and all incumbent CPD sworn personnel the physical fitness
24 performance standards that the FIT study established had a disparate impact on female police
25 officers.
26

1 21. Upon information and belief, DPS did not adopt the physical fitness tests and
2 performance standards recommended by the 2000 FIT study. Instead, DPS requires recruits to
3 pass the Peace Officer Physical Aptitude Test ("POPAT"), for which cadets are trained in the
4 ALEA.

5 22. The POPAT is comprised of five work sample tests designed to simulate actual job
6 tasks for a patrol officer: (1) 99-yard obstacle course run; (2) 165-pound body drag; (3) six-
7 foot chain-link fence climb; (4) six-foot solid fence climb; and (5) 500-yard run. ALEA cadets
8 are scored on each test individually, and their individual test scores are combined to arrive at a
9 total test score for each cadet. Scoring the tests in this manner, as opposed to scoring each
10 individual test on a pass/fail basis as the FIT study recommended, allows cadets to compensate
11 for performing less than optimally on one test by performing extremely well on other tests.

12 23. According to a January 1, 2007, publication of the Arizona Peace Officer Standards
13 and Training Board ("AZ POST"), the minimum total passing POPAT score, for both male
14 and female cadets, is 384. The fail rate for female cadets is under 10%.

15 24. In December 2006, CPD published a Promotional Process for the Position of Police
16 Sergeant ("Promotional Process") announcing two available sergeant positions in 2007.

17 25. The Promotional Process was limited to current employees, i.e., sworn CPD
18 personnel hired before January 1, 2007.

19 26. The Promotional Process mandated that the successful candidate satisfy the
20 physical fitness standards imposed by General Order 206 before being promoted to sergeant.

21 27. According to General Order 206, no CPD sworn personnel hired before January 1,
22 2007, would be required to satisfy the FIT study standards until January 1, 2010.

23 28. Defendants have not performed, or caused to have performed by any outside
24 agency, any study correlating performance on the General Order 206 battery of physical
25 fitness tests with performance of the job duties of a CPD sergeant.
26

1 29. Defendants have not performed, or caused to have performed by any outside
2 agency, any study correlating performance on the General Order 206 battery of physical
3 fitness tests with performance of any CPD law enforcement position.

4 30. Before General Order 206 was issued in December 2006, CPD had basic physical
5 fitness requirements for applicants to the force but did not require its incumbent officers—
6 including incumbent officers seeking promotion—to take or pass a physical fitness test.

7 31. Kuhlt was the only woman to apply for the CPD sergeant positions available in
8 2007.

9 32. Kuhlt is the only woman ever to apply for promotion to sergeant at the CPD.

10 33. As required by the Promotional Process, Kuhlt submitted a written application,
11 took a written exam on January 1, 2007, and an oral exam on January 17, 2007. Kuhlt's total
12 score on these exams was the highest of all officers who applied to promote to sergeant at that
13 time.

14 34. Over her nearly 12 years with the CPD, Kuhlt has received many commendations
15 and letters of recognition from her superiors, other law enforcement agencies, prosecutors and
16 the public.

17 35. Because Detective Kuhlt was under the care of a physician for a back injury and
18 had not been released to take the physical fitness exam, the first of two available sergeant
19 positions was given to a male officer who passed the physical fitness test on January 16, 2007,
20 and was promoted on February 18, 2007.

21 36. After being released by her doctor, Kuhlt took the physical fitness exam on April
22 25, 2007, and July 10, 2007. On each of these tests, Kuhlt met the FIT standards for the bench
23 press, vertical leap, push-ups and sit-ups but did not meet the standards for the agility run (18.7
24 seconds in April; 18.3 seconds in July); 300 meter run (71 seconds in April; 69 seconds in
25 July); and the 1.5 mile run (17:47 in April; 17:43 in July).
26

1 37. Kuhlt would have taken the test again in October 2007, but due to continuing back
2 problems requiring further treatment was advised by her doctor not to run for 30 days.

3 38. On October 17, 2007, Bartosh, who at that time was still CPD Chief of Police,
4 wrote Kuhlt informing her that, although she was still the top-ranked candidate for sergeant, he
5 would be giving the other available position to another applicant because she had not yet
6 passed the fitness test and it was unclear when she could be prepared to do so. Accordingly,
7 another male officer, who had passed the physical fitness exam on December 5, 2006, and
8 October 20, 2007, was promoted to sergeant on October 28, 2007.

9 39. Pursuant to General Order 206, Kuhlt took the physical fitness test again on
10 January 16, 2008, and again did not pass the running components of the test. She also did only
11 30 sit-ups in one minute.

12 40. On April 4, 2008, Kuhlt wrote a memorandum to Fanning, who was then the
13 Interim Chief of Police, and the CPD Human Resources Department, expressing her concerns
14 about the disparate impact that the physical fitness test had on female officers and her belief
15 that the fitness test operated as a "glass ceiling" preventing her promotion.

16 41. In an undated letter responding to Kuhlt, Fanning agreed that the fitness test had a
17 disparate impact on women, but maintained that it was allowed because the fitness standards
18 were "job related for the position in question and consistent with business necessity."
19 Fanning's letter to Kuhlt also cited the statement from the FIT study that, with 3 to 6 months
20 moderate training, female officers could improve their performance on the physical fitness
21 tests by 20 to 25 percent.

22 42. In May 2008, two more sergeant positions became available at CPD. In the May
23 2008 promotional process, as opposed to the one posted in December 2006, a candidate who
24 had not yet passed the physical fitness exam could not take the written or oral exams for
25 sergeant.
26

1 43. In another attempt to qualify for promotion, Kuhlert took the physical fitness test on
2 May 12, 2008. That time, she passed the agility run and bench press, but only jumped 15
3 inches on the vertical jump. She also did only 30 sit-ups in one minute, and ran the 300 meters
4 in 72 seconds. Detective Kuhlert re-injured her back during the 1.5 mile run, which she
5 nevertheless completed in 19 minutes and 17 seconds.

6 44. Two male applicants who passed the May 12, 2008, fitness test were promoted to
7 sergeant on June 22, 2008, and August 17, 2008, respectively.

8 45. As a result of the back injury sustained during the May 12, 2008, fitness test, Kuhlert
9 filed a worker's compensation claim against CPD.

10 46. In the last quarter of 2008, CPD held testing for a law enforcement officer position.

11 47. A female officer named Lori Carver ("Carver"), who had been certified by DPS in
12 January 2008, tested among other individuals.

13 48. Carver was the only previously certified officer to test for the CPD position at that
14 time.

15 49. Because Carver had been previously certified as a law enforcement officer, CPD
16 policy did not require that she take the written exam. Carver was required to take an oral
17 exam, however, which she passed.

18 50. A male applicant named Clint Combs ("Combs"), a personal friend of a CPS
19 sergeant and with whom Eisenga had played golf, also tested on the same day as Carver.

20 51. Because Combs was not a previously certified police officer, he was required to
21 take both the written and oral exams.

22 52. According to CPD policy, an applicant must score a total of 70% on the written and
23 oral exams to be eligible to take the physical fitness exam, which CPD placed at the end of the
24 application process for new hires.

25 53. Combs' total score on the written and oral exams missed the cut-off by a few tenths
26 of a percent.

1 54. In consultation with Fanning, Eisenga rounded Combs' score on the written test up
2 to 70% to allow Combs to take the physical fitness test.

3 55. Although others had taken the written and oral exams, Carver and Combs were the
4 only applicants who were allowed to take the physical fitness exam.

5 56. Eisenga asked Carver to do the bench press—a test the FIT study indicated women
6 police officers uniformly had problems passing, even after specific training—as the initial test,
7 even though it is listed second, after the agility run, in the FIT recommendations.

8 57. Carver could not accomplish the bench press, and Eisenga did not allow her to take
9 any other parts of the physical fitness test that day.

10 58. Eisenga told Carver she could come back to try to pass the physical fitness test the
11 next time CPD offered it.

12 59. Combs took all portions of the physical fitness exam and did not pass the last event,
13 i.e., the 1.5 mile run.

14 60. Eisenga invited Combs to come back in two weeks to re-test on the 1.5 mile run.

15 61. When Combs came back for re-testing, Eisenga allowed him to do the 1.5 mile run
16 without having to take and pass the previous physical tests beforehand. That day, Combs
17 satisfied the 1.5 mile run standard.

18 62. On or about May 6, 2009, Kuhl filed a timely charge of employment
19 discrimination on the basis of sex, and the Civil Rights Division ("Division") commenced an
20 investigation of the charge.

21 63. At the conclusion of the investigation, the Division determined that there was
22 reasonable cause to believe that Defendants discriminated against Kuhl because of her sex by
23 adopting a physical fitness test that Defendants knew had a disparate impact on female police
24 officers, which Defendants had not validated as job related or consistent with business
25 necessity, and to which less restrictive alternatives existed and had been adopted by state law
26 enforcement agencies, in order to prevent well-qualified female law enforcement officers like

1 Kuhlert and Carver from being promoted or hired. The Division also concluded that there was
2 reasonable cause to believe that Defendants discriminated against Kuhlert because of sex by
3 requiring her to pass the physical fitness test to promote to sergeant in 2007 when General
4 Order 206 provided that sworn personnel like Kuhlert who had been hired before January 1,
5 2007, did not need to pass the physical fitness test until January 1, 2010, and by applying the
6 physical fitness testing policy and performance standards more rigorously against Kuhlert and
7 Carver than against Combs.

8 64. The Civil Rights Division issued its Cause Finding on April 28, 2009, and since
9 that time, the Division, Kuhlert and Defendants have not entered into a Conciliation Agreement.
10 The parties having thus exhausted their administrative remedies, the State is authorized to file
11 this Complaint pursuant to A.R.S. § 14-1481(D).

12 STATEMENT OF CLAIMS

13 **COUNT I**

14 **Unequal compensation, terms, conditions or privileges of employment based on sex** 15 **in violation of A.R.S. § 41-1463(B)(1)**

16 65. The State re-alleges and incorporates by reference the allegations contained in
17 paragraphs 1 through 64 of this Complaint.

18 66. Under A.R.S. § 41-1463(B)(1), it is an unlawful employment practice for an
19 employer to discriminate against any individual with respect to compensation, terms,
20 conditions, or privileges of employment because of sex.

21 67. Defendants unlawfully discriminated against Kuhlert in violation of A.R.S. § 41-
22 1463(B)(1) by requiring her to take and pass a physical fitness test that Defendants knew had a
23 disparate impact on women and which Defendants had not validated as job related to the
24 position of sergeant or any other CPD law enforcement position or consistent with business
25 necessity; by requiring Kuhlert to take and pass this test before she could be promoted to
26 sergeant in 2007 and 2008, even though the Order mandating the policy provided that officers

1 like Kuhlert who had been hired before January 1, 2007, did not have to pass the test until
2 January 1, 2010; by denying Kuhlert promotion to the rank of sergeant because she had not
3 passed the invalid and unnecessary physical fitness test; by promoting male officers who were
4 less qualified than Kuhlert in her stead; by relaxing the testing protocols and passing standards
5 for at least one male applicant to the CPD to allow him to enter the police academy while
6 holding Kuhlert and a previously certified female police officer to different, more rigorous
7 standards to prevent them from promoting or being hired by the CPD.

8 68. As a result of Defendants' discrimination, Kuhlert suffered monetary damages for
9 which she should be compensated in an amount to be determined at trial pursuant to A.R.S. §
10 41-1481(G).

11 69. To remedy the effects of Defendants' discrimination, Kuhlert also is entitled to
12 affirmative relief under A.R.S. § 41-1481(G), including but not limited to rightful place
13 reinstatement.

14 70. The State also is entitled to injunctive relief against Defendants' actions pursuant to
15 A.R.S. § 41-1481(G).

16 COUNT II

17 **Limiting, segregating or classifying employees or applicants for employment so as to** 18 **deprive them of employment opportunities based on sex in violation of** 19 **A.R.S. § 41-1463(B)(2)**

20 71. The State re-alleges and incorporates by reference the allegations contained in
21 paragraphs 1 through 70 of this Complaint.

22 72. Under A.R.S. § 41-1463(B)(2), it is an unlawful employment practice for an
23 employer to limit, segregate or classify employees or applicants for employment in any way
24 which would deprive or tend to deprive any individual of employment opportunities or
25 otherwise adversely affect the individual's status as an employee because of sex.
26

1 73. Defendants unlawfully discriminated against Kuhlert in violation of A.R.S. § 41-
2 1463(B)(2) by requiring her to take and pass a physical fitness test that Defendants knew had a
3 disparate impact on women and which Defendants had not validated as job related to the
4 position of sergeant or any other CPD law enforcement position or consistent with business
5 necessity; by requiring Kuhlert to take and pass this test before she could be promoted to
6 sergeant in 2007 and 2008, even though the Order mandating the policy provided that officers
7 like Kuhlert who had been hired before January 1, 2007, did not have to pass the test until
8 January 1, 2010; by denying Kuhlert promotion to the rank of sergeant because she had not
9 passed the invalid and unnecessary physical fitness test; by promoting male officers who were
10 less qualified than Kuhlert in her stead; by relaxing the testing protocols and passing standards
11 for at least one male applicant to the CPD to allow him to enter the police academy while
12 holding Kuhlert and a previously certified female police officer to different, more rigorous
13 standards to prevent them from promoting or being hired by the CPD.

14 74. As a result of Defendants' discrimination Kuhlert suffered monetary damages for
15 which she should be compensated in an amount to be determined at trial pursuant to A.R.S. §
16 41-1481(G).

17 75. To remedy the effects of Defendants' discrimination, Kuhlert also is entitled to
18 affirmative relief under A.R.S. § 41-1481(G), including but not limited to rightful place
19 reinstatement.

20 76. The State also is entitled to injunctive relief against Defendants' actions pursuant to
21 A.R.S. § 41-1481(G).

22 **PRAYER FOR RELIEF**

23 WHEREFORE, the State requests that this Court:

24 A. Enter judgment on behalf of the State, finding that Defendants unlawfully
25 discriminated against Kuhlert because of her sex in violation of the Arizona Civil Rights Act.
26

1 B. Enjoin Defendants, their successors, assigns and all persons in active concert or
2 participation with Defendants, from engaging in any employment practice, including applying
3 invalid and unnecessary physical fitness performance standards that are known to have a
4 disparate impact on women, which discriminates in violation of the Arizona Civil Rights Act.

5 C. Order Defendants to make Kuhlert whole and award Kuhlert back wages
6 representing the difference between the salary Kuhlert would have been paid had she been
7 promoted to sergeant, and the amount that she was paid by Defendants, calculated from
8 February 18, 2007, the first date a male officer was wrongfully promoted in her stead, together
9 with prejudgment interest, in amounts to be determined at trial.

10 D. Order rightful place reinstatement for Kuhlert, including but not limited to
11 promotion to the rank of sergeant retroactive to February 17, 2007, the day before the first
12 male officer was wrongfully promoted in her stead, and adjusting seniority, pension and other
13 benefits calculations accordingly.

14 E. Order Defendants, their successors, assigns and all persons in active concert or
15 participation with Defendants, to create and enforce policies, practices and programs that
16 provide equal employment opportunities for all their employees, and that eradicate the effects
17 of their present unlawful employment practices, including but not limited to policy changes
18 and training.

19 F. Issue an Order authorizing the State to monitor Defendants' compliance with the
20 Arizona Civil Rights Act and order Defendants, its successors, assigns and all persons in active
21 concert or participation with Defendants, to pay the State a reasonable amount for such
22 monitoring.

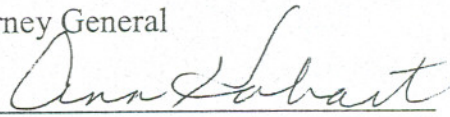
23 G. Award the State its taxable costs incurred in bringing this action.

24 H. Grant such other and further relief as this Court may deem just and proper in the
25 public interest.

26 ///

1 Dated this 5th day of May, 2009.

2 TERRY GODDARD
3 Attorney General

4 By 

5 Michael M. Walker

6 Ann Hobart

7 Assistant Attorneys General

8 Civil Rights Division

9 Attorneys for Plaintiff

10 455467